IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 8092 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KIRITBHAI RANCHHODBHAI DESAI - Applicant(s)
Versus
KIRANBEN BHUPENDRABHAI PRAJAPATI & 1 - Respondent(s)

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Appearance :
MR JB PARDIWALA for Applicant(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1,
Mr. KT Dave, Addl. PUBLIC PROSECUTOR for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 12/09/2007
ORAL JUDGMENT

Though served, nobody appears on behalf of respondent No.1, original-complainant. Under the circumstances this Court has no other

alternative but to proceed further with hearing of the present application on merits ex-parte.

2. By way of this application under Section 482 of the Code of Criminal Procedure the applicant original-accused No.3 has prayed for an appropriate order quashing and setting aside criminal complaint being Criminal Case No. 2082/2007 pending in the Court of JMFC, Vadodara for the offences under Section 138 of the Negotiable Instruments Act and the order of process issued by the learned JMFC dated 31.3.2007 in the complaint.

3. A criminal complaint being Criminal Case No. 2082/2007 has been filed by respondent No.1 herein in the Court of learned JMFC, Vadodara against the petitioner and others for the offence under Section 138 of the Negotiable Instruments Act [“the Act” for short] alleging inter alia that original-accused No.1 was friend of original-complainant; as accused persons were

owners of one Erect Engineering and they were in need of finance she has given Rs. 2,50,000 to them and at that time the applicant herein original-accused No.3 was present when finance was given to accused No. 1 and 2. It is further alleged in the said complaint that thereafter the original-accused No.2 who is son of the petitioner had repaid the said loan amount of Rs. 2,50,000 by cheque No. 018883 and when the said cheque was deposited with bank the same has been returned with endorsement “funds insufficient”. It is further alleged and averred in the complaint that thereafter again the cheque was deposited however the same was again returned with endorsement “funds insufficient”. It is also averred and alleged in the complaint that thereafter all the accused persons were served with Registered AD notice as required under Section 138 of the Act; all the accused persons have given evasive reply and have not paid the amount under the cheque and thus committed offence under Section 138 of the Act; that the

learned JMFC, Vadodara issued process against the applicant and others for the offence under Section 138 of the Act; and hence the applicant herein, original-accused No.3 has preferred the present application under Section 482 of the CR.P.C., for quashing and setting aside the said complaint.

4. Shri Pardiwala, learned advocate appearing on behalf of the applicant, original-accused No.3 has submitted that in the reply to the statutory notice itself the original-complainant was informed that the applicant has nothing to do with the issuance of the cheque and the cheque has been issued by the original-accused No.2 duly signed by accused No.2 on behalf of proprietary concern, Erect Engineering and as it was a proprietary concern the applicant cannot be held vicariously liable as provided in Section 141 of the Act. It is submitted that deliberately nowhere in the complaint it is mentioned that Erect Engineering was a

partnership firm and/or association of persons. In fact it is a proprietary concern and citing the judgment in the case of ***Raghu Lakshminarayanan V. M/s. Fine Tubes,*** reported in **2007 Cri.L.J. 2436** wherein it is held that when the cheque has been issued for and on behalf and/or by the proprietary concern only the proprietor/owner of the proprietary firm can be held liable for the offences under Section 138 of the Act and no other person can be held vicariously liable even under Section 141 of the Act, it is requested to quash and set aside the impugned complaint. Shri KT Dave, learned APP appearing on behalf of the State has requested to pass appropriate order considering the averments and allegations made in the complaint.

5. Heard the learned advocates appearing for the parties. At the outset it is required to be noted that the cheque has been signed by the original-accused No.2 for and on behalf of Erect Engineering. Erect Engineering is the

proprietary firm and in the complaint the only allegation against the petitioner original-accused No.3 is that at the time when finance was given to other accused persons the petitioner was present. Merely because the petitioner was present at the time when finance was given the petitioner cannot be held liable under Section 138 of the Act. Erect Engineering on whose behalf the original-accused No.2 has issued the cheque is a proprietary firm. As held by the Hon'ble Supreme Court in the case of *Raghu Lakshminarayanan [supra],* when it is a proprietary firm it is only the individual owner and/or proprietor of the said firm can be held liable for the offence under Section 138 of the Act. In the said decision, the Hon'ble Supreme Court has observed in paragraphs No. 12 and 13 as under;

> 12. *If accused No.1 was not a Company within the meaning of Section 141 of the Negotiable Instruments Act, the question of an employee being preceded*

against in terms thereof would not arise. Respondent was aware of the difference between a 'partnership firm' and a 'business concern' as would be evident from the fact that it described itself as a partnership firm and the accused No.1, as a business concern. Significantly, Respondent deliberately or otherwise did not state as to in which capacity the appellant had been serving the said business concern. It, as noticed hereinbefore, described him as in-charge, Manager and Director of the accused No.1. A person ordinarily cannot serve both in the capacity of a Manager and a Director of a Company.

13. The distinction between partnership firm and a proprietary concern is well known. It is evident from Order XXX, Rule 1 and Order XXX Rule 10 of the Code of Civil Procedure. The question came up for consideration also before this Court in M/s. Ashok Transport

Agency v. Awadhesh Kumar and another [(1998) 5 SCC 567] wherein this Court stated the law in the following terms:-

"6. A partnership firm differs from a proprietary concern owned by an individual. A partnership is governed by the provisions of the Indian Partnership Act, 1932. Though a partnership is not a juristic person but Order XXX, Rule 1, CPC enables the partners of a partnership firm to sue or to be sued in the name of the firm. A proprietary concern is only the business name in which the proprietor of the business carries on the business. A suit by or against a proprietary concern is by or against the proprietor of the business. In the event of the death of the proprietor of a proprietary concern, it is the legal representatives of the proprietor who alone can sue or be sued in respect of the dealings of the

proprietary business. The provisions of Rule 10 of Order XXX, which make applicable the provisions of Order XXX to a proprietary concern enable the proprietor of a proprietary business to be sued in the business names of his proprietary concern. The real party who is being sued is the proprietor of the said business. The said provision does not have the effect of converting the proprietary business into a partnership firm. The provisions of Rule 4 of Order XXX have no application to such a suit as by virtue of Order XXX, Rule 10 the other provisions of Order XXX are applicable to a suit against the proprietor of proprietary business 'in sofar as the nature of such case permits'. This means that only those provisions of Order XXX can be made applicable to proprietary concern which can be so made applicable keeping in view the nature of the case."

Now, considering the above decision and the averments and allegations in the complaint and Erect Engineering being a proprietary firm in which the petitioner herein, original-accused No.3 is neither the proprietor nor any member of the association of persons the petitioner cannot be held vicariously liable as provided under Section 141 of the Act the impugned complaint against the petitioner original-accused No.3 for the offences under Section 138 of the Act requires to be quashed and set aside.

6. For the reasons stated hereinabove, the petition succeeds. The impugned complaint being Criminal Case No. 2082 of 2007 pendign in the Court of JMFC, Vadodara and the order of process issued dated 31.3.2007 are required to be quashed and set aside only qua the petitioner, original-accused No.3. Rule is made absolute accordingly.

[M.R. Shah, J.]

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